

signal is relayed to their televisions by a master antenna.³⁶ Aside from the fact that TV Max *does not* utilize a master antenna, it clearly *does* engage in far more than simply relaying over-the-air signals to its subscribers. FOX understands that TV Max makes the Stations' signals available to its subscribers via set-top-boxes that (1) use advanced electronics to integrate the signals into the cable channel line-up; (2) enable viewers to utilize advanced services (such as interactive programming guides and digital video recorders); and (3) in some or all cases rely upon a digital tuner contained not in a television (as would be expected for true over-the-air reception) but in the set-top-box itself.³⁷ For that matter, FOX understands that the Stations' HD signals appear in the TV Max channel line-up not on their over-the-air channels (20 for KTXH and 26 for KRIV), but on channels 602 and 606.³⁸ To accomplish all of these ends, TV Max must manipulate, encode and retransmit FOX's signals between its head-end and viewers' homes. Even if it were operating a master antenna facility, TV Max is not by any stretch of the imagination simply relaying signals passively from an over-the-air antenna to a television set.³⁹

³⁶ See 1993 Order, 8 FCC Rcd at 2997 (citing comments filed by the National Association of Broadcasters, which said "the simple operation of a collective antenna in an apartment building to receive local television signals does not involve the redistribution of broadcast signals, and the consent of those local stations would not be required"). The FCC also analogized this exception to provisions in the Copyright Act that exempt "from copyright liability . . . a service that 'consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the [FCC], within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission.'" *Id.* at n.375 (citing 17 U.S.C. § 111(a)).

³⁷ This has to be the case for any subscriber that still receives broadcast signals from TV Max for viewing on an analog television or a digital monitor lacking an integrated tuner, which cannot receive over-the-air broadcast signals on their own.

³⁸ See Di Scipio Declaration; see also <http://www.wavevision.com/houston/channel-line-up#gold> (last visited Apr. 11, 2012).

³⁹ See 1993 Order, 8 FCC Rcd at 2997.

In short, there is no basis for TV Max's bald assertion that it does not have to comply with the retransmission consent requirements of the Act and the FCC's rules.⁴⁰ FOX therefore urges the Commission to expedite initiation of a forfeiture proceeding and issuance of a notice of apparent liability to penalize TV Max for its willful violations to the maximum extent allowed by law. As the Commission again confirmed just last month, a cable system that "retransmit[s] the signal of a broadcasting station without 'the express authority'" of the station "willfully and repeatedly violate[s] Section 325 of the Communications Act . . . and Section 76.64 of the Commission's rules."⁴¹

In the *Bailey NALs*, the FCC acknowledged its longstanding position that "if an MVPD retransmits a television signal without consent, Commission intervention would be consistent with precedent and 'properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture.'"⁴² With regard to TV Max's assertion that Section 76.64(e) of the FCC's rules insulates it from liability here, the *Bailey NALs* also made clear that it is "irrelevant . . . that [the cable operator] receives the signal 'free over the air to antenna receivers.' We emphasize that the cable operator has discretion to decide whether to

⁴⁰ FOX responded to Mr. Gomez's March 16, 2012 letter, disputing TV Max's assertions regarding Section 76.64(e) and offering TV Max an opportunity to supply information that would "demonstrate that TV Max does satisfy all of the requirements for exemption" Letter from Catherine L. Robb, counsel to FOX, to Richard Gomez, Vice President Operations, TV Max, Inc. (dated Mar. 22, 2012). To date, TV Max still has not provided any substantive response. A copy of FOX's letter is attached as Attachment 6 hereto.

⁴¹ *In re Notice of Apparent Liability for Forfeiture of Bailey Cable TV, Inc.*, 2012 WL 928199, DA 12-420 (2012); *In re Notice of Apparent Liability for Forfeiture of Bailey Cable TV, Inc.*, 2012 WL 928200, DA 12-421 (2012) (the "*Bailey NALs*") (each quoting 47 U.S.C. § 325).

⁴² *Bailey NALs*, at ¶ 6 (quoting 1993 Order, 8 FCC Rcd at 3005).

enter into a retransmission consent agreement, but in the absence of such an agreement, the Act and the Commission's rules prohibit retransmission of the station's signal."⁴³

Pursuant to Section 1.80 of the Commission's rules, a "forfeiture penalty may be assessed against any person found to have . . . willfully or repeatedly failed to comply with any provisions of the [Act]; or of any rule, regulation or order issued by the Commission"⁴⁴

Like the cable operator in the *Bailey NALs*, TV Max has willfully violated both the Act and the Commission's rules and its violation is repeated and ongoing. The *Bailey NALs* indicate that it would be appropriate to assess a base forfeiture of \$7,500 for each violation, with each day of unlawful carriage a separate violation. Thus, the Commission calculated that the cable operator in the *Bailey NALs* was subject to a potential forfeiture of \$510,000 (the base forfeiture multiplied by 34 days of unlawful carriage for each station carried).⁴⁵ The FCC should utilize the same formula in determining a forfeiture against TV Max for its 103 days (and running) unauthorized carriage of the two Stations here. This would send a stern and necessary signal that the FCC will not tolerate wanton disregard of the retransmission consent regime. Otherwise, the Commission risks MVPDs continuing to flaunt the Act and its rules by carrying broadcast stations without consent, as TV Max has willfully done notwithstanding the recent *Bailey NALs*.

* * *

⁴³ *Id.* at ¶ 7 (internal citation omitted).

⁴⁴ 47 C.F.R. § 1.80(a)(2), which implements Section 503 of the Act, 47 U.S.C. § 503.

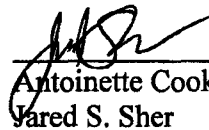
⁴⁵ *See Bailey NALs*, at ¶ 8. Only because Bailey submitted financial information indicating that \$510,000 in forfeitures would cause it "extreme financial hardship, and would represent a significant percentage of [its] gross revenues," did the Commission impose a lower actual amount of apparent liability. *Id.*

For the foregoing reasons, FOX respectfully requests that the Commission find TV Max in violation of the Act and the rules and require it to show cause why the Commission should not order TV Max to cease and desist from retransmitting the Stations' signals. In the meantime, the FCC should order TV Max to terminate carriage of the Stations on all of its systems. Finally, FOX respectfully requests that the Commission initiate a forfeiture proceeding and issue a notice of apparent liability to penalize TV Max to the fullest extent allowed by law for its willful and deliberate actions.

Respectfully submitted,

FOX TELEVISION HOLDINGS, INC.

By:



Antoinette Cook Bush

Jared S. Sher

of

Skadden, Arps, Slate, Meagher & Flom LLP

1440 New York Avenue, N.W.

Washington, D.C. 20005

(202) 371-7000

Its Attorneys

Dated: April 12, 2012

ATTACHMENT 1

DECLARATION

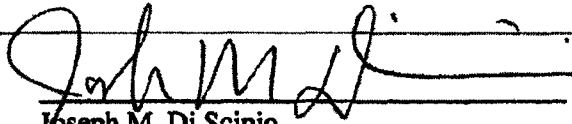
I, Joseph M. Di Scipio, hereby state as follows:

1. I am Vice President, Legal & FCC Compliance, Fox Television Stations, Inc., which is a subsidiary of Fox Television Holdings, Inc. ("FOX") and licensee of KTXH(TV) and KRIV(TV), Houston, Texas (the "Stations"). I submit this Declaration in connection with FOX's Retransmission Consent Complaint and Petition for Order Requiring TV Max, Inc. to Show Cause Why It Should Not Cease and Desist From Violating Section 325(b) of the Communications Act, dated April 12, 2012 (the "Complaint").
2. FOX and TV Max Corporate, Inc. ("TV Max") were parties to that certain "Fox Television Holdings Retransmission Consent Agreement" (the "Agreement"), effective for the term running January 1, 2009 through December 31, 2011. The Agreement expired in accordance with its terms on December 31, 2011. The Agreement provided FOX's consent to TV Max's retransmission of the Stations on TV Max cable systems in the Houston, Texas Designated Market Area (the "DMA") until December 31, 2011. The Agreement also provided that, in exchange for FOX's consent, TV Max, among other things, provided FOX commercial advertising "spots" to be telecast during available time on TV Max's cable systems.
3. FOX validly elected retransmission consent for the 2012-2014 election cycle. A copy of FOX's election notice to TV Max is attached hereto as Exhibit A.
4. On December 20, 2011, I sent TV Max a letter reminding it that the Agreement was set to expire on December 31, 2011, and alerting it that carriage of the Stations after the expiration of the Agreement would constitute a violation of the Communications Act and the FCC's rules (as well as copyright infringement). TV Max continued to carry the Stations on its cable systems upon expiration of the Agreement.
5. On March 13, 2012, FOX's Texas counsel sent another letter to TV Max, reiterating that the cable operator's continuing carriage of the Stations without consent violates Federal law. FOX demanded that TV Max cease and desist from its unauthorized retransmissions. TV Max has continuously carried the Stations on its cable systems without FOX's authorization since January 1, 2012.
6. I understand that TV Max receives the signals of FOX's Stations at a central head-end in the DMA, from where TV Max's fiber ring retransmits those signals to various apartment buildings dispersed throughout the DMA. I further understand that TV Max does not offer its subscribers in the DMA an option not to receive the Stations' signals, nor has it reduced the subscription fees paid by its retail customers since January 1, 2012.

7. I also understand that TV Max makes the Stations' signals available to its subscribers via set-top-boxes that use advanced electronics to integrate the signals into the cable channel line-up; that enable viewers to utilize advanced services (such as interactive programming guides and digital video recorders); and that in some or all cases rely upon a digital tuner contained in the set-top-box itself. I also understand that the Stations' HD signals appear in the TV Max channel line-up not on their over-the-air channels, but on channels 602 and 606.
8. As of April 12, 2012, TV Max willfully and deliberately continued to retransmit the signals of the Stations on its cable systems in the DMA.

I declare under penalty of perjury that I have read the foregoing Complaint, that the facts therein and in this Declaration are true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry, that the Complaint is well grounded in fact, that it is warranted by existing law or good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.

Executed on April 12, 2012



Joseph M. Di Scipio
Vice President, Legal & FCC Compliance
Fox Television Stations, Inc.
444 N. Capitol Street, N.W.
Washington, D.C. 20001

Exhibit A



D'ARTAGNAN BEBEL

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Vice President,
General Manager

August 23, 2011

TVMax
10300 Westoffice Drive
Houston, TX 77042

Re: Election of Retransmission Consent

Dear Sir or Madam,

This letter is a notification that television stations KRIV and KTXH, Houston, Texas ("Stations"), owned and operated by Fox Television Holdings, Inc. ("Fox"), elect retransmission consent with respect to retransmission of their broadcast signals by TVMax Houston, LP or its affiliates ("Operator"). This retransmission consent election is for all communities within the Stations' "television market" (as defined in 47 C.F.R. § 76.55(e)) served by cable systems owned or managed by or affiliated with Operator including those comprised of the following headends: Houston, Idlewood Park, Oaks og Greenspoint, Seabrook, Walnut Grove, Webster, and any other headend for which Stations could elect must carry under the Rules referenced below.

Accordingly, Stations hereby notifies Operator that, pursuant to Section 325(b)(3)(B) of the Communications Act of 1934, as amended (the "Act"), and Section 76.64(f)(2) of the Rules and Regulations of the Federal Communications Commission (the "Rules"), Stations elect to assert their rights under Section 325(b)(1)(A) of the Act and Section 76.64(a) of the Rules to require that Operator obtain Stations' express consent before retransmitting its signals. This election of retransmission consent is for the period January 1, 2012 through December 31, 2014.

Please direct all correspondence and any questions regarding this matter to:

Joseph M. Di Scipio
Vice President, Legal and FCC Compliance
Fox Television Stations, Inc.
444 North Capitol Street, NW, Suite 740
Washington, DC 20001
jdiscipio@newscorp.com
202-715-2350

Sincerely,

D'Artagnan Bebel
VP/General Manager

cc. Public File

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

TVMax
10300 Westoffice Drive
Houston, TX 77042

2. Article Number
(Transfer from service label)

7011 0470 0000 9470 8493

PS Form 3811, February 2004

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X *C. Smith-Col* ☐ Agent ☐ Addressee

B. Received by (Printed Name) **C. Date of Delivery**

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

Domestic Return Receipt

102595-02-44-1540

ATTACHMENT 2

DECLARATION

I, Steven W. Hunt, hereby state as follows:

1. I am Regional Vice President, Affiliate Sales and Marketing, for Fox Cable Networks. My responsibilities include negotiating for retransmission consent with respect to broadcast television stations KTXH(TV) and KRIV(TV), Houston, Texas (the "Stations"). I submit this Declaration in connection with Fox Television Holdings, Inc.'s ("FOX") Retransmission Consent Complaint and Petition for Order Requiring TV Max, Inc. to Show Cause Why It Should Not Cease and Desist From Violating Section 325(b) of the Communications Act, dated April 12, 2012 (the "Complaint").
2. FOX diligently and in good faith attempted to negotiate with TV Max between August and December of 2011. Specifically, in September 2011, FOX proposed terms for TV Max's continued carriage of the Stations beyond the end of 2011. FOX repeatedly attempted to contact TV Max by telephone, mail and email, but TV Max refused to provide any substantive response.
3. I maintained detailed records concerning my attempts to contact TV Max, by telephone, email and mail, during the time period August 2011-December 2011. The summary of this correspondence set forth in the foregoing Complaint is true and accurate.

I declare under penalty of perjury that I have read the foregoing Complaint, that the facts therein and in this Declaration are true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry, that the Complaint is well grounded in fact, that it is warranted by existing law or good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.

Executed on April 12, 2012



Steven W. Hunt
Regional Vice President, Affiliate Sales and Marketing
Fox Cable Networks
100 East Royal Lane
Irving, TX 75039

ATTACHMENT 3



FOX TELEVISION STATIONS, INC.

A UNIT OF FOX ENTERTAINMENT GROUP

444 North Capitol Street NW, Suite 740
Washington, DC 20001
Phone 202 715 2350 • Fax 202 824 6510
Cell 202 679 8567 • e-mail: jdiscipio@newscorp.com

December 20, 2011

Joseph M. Di Scipio
Vice President
Legal and FCC Compliance

Richard Gomez
Vice President Operations
TVMAX Inc.
10300 Westoffice Drive, Suite 200
Houston, TX 77042

Re: Notice to Cease and Desist Copyright Infringement and Violation of the Communications Act

Dear Mr. Gomez:

With December 31 quickly approaching, we are writing because your contract to carry the Fox television stations referenced below expires on December 31, 2011, and we do not have an agreement in place for continued carriage.

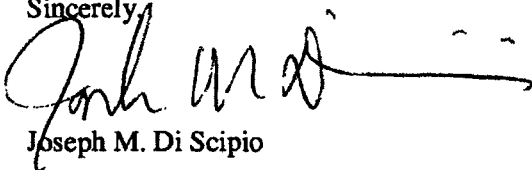
As you know, Fox Television Stations, Inc. ("Licensee"), licensee of KRIV and KTXH ("Stations"), elected retransmission consent status for all of the Stations transmitted by TV MAX Inc. ("Operator") cable systems, including, without limitation, those serving the Houston designated market area. Licensee made this election for the period beginning January 1, 2012, and ending December 31, 2014. As of January 1, 2012, Operator will not have the right to retransmit the signals of the Stations and must cease such retransmission as of December 31, 2011, at 11:59 p.m.

Although multiple efforts have been made through phone calls and emails, we have been unable to reach agreement on the terms of carriage of the Stations' signals going forward.

Retransmission of the Stations without the consent of Licensee is a violation of the Copyright Act, the Communications Act of 1934, as amended, and the rules of the Federal Communications Commission ("FCC"). If Operator continues to retransmit the signals of the Stations after December 31, 2011, Licensee may pursue appropriate damages under the Section 504 of the Copyright Act, which allows a victim of willful copyright infringement to recover, at its election: (a) all actual damages or (b) statutory damages in the amount of \$ 150,000 per work, as well as attorneys' fees. In addition, should Operator continue retransmitting the Stations after December 31, 2011, Licensee may refer this matter to the FCC for violation of the Communications Act.

Should you wish to have the right to continue to carry the Stations as of January 1, 2012, please contact Steven Hunt at (972) 868-1801. No temporary rights to retransmit the Stations shall be granted without agreement on rates for retransmission consent.

Sincerely,



Joseph M. Di Scipio

ATTACHMENT 4



(512) 481-8400

Catherine.robbs@sedgwicklaw.com

March 13, 2012

Via Facsimile (713) 587-1280 and Certified Mail

Richard Gomez
Vice President Operations
TVMax Inc.
10300 Westoffice Drive, Suite 200
Houston, Texas 77042

Re: Notice to Cease and Desist Retransmission of KRIV and KTXH signals

Dear Mr. Gomez:

We have been retained by Fox Television Stations, Inc. ("Licensee"), licensee of KRIV and KTXH ("Stations"), to represent them in their claims against TVMax Inc. ("TVMax"). Please direct all further communications concerning this matter to us.

TVMax is currently blatantly infringing upon the copyright of Licensee. This is clear from the fact that the previous retransmission agreement between Licensee and TVMax expired on December 31, 2011, yet TVMax has continued to carry KRIV and KTXH without a retransmission agreement since that time — for almost two and a half months. As recently as March 5, 2012, Patricia K. Russell, Administrative VP at TVMax, confirmed that TVMax is still carrying KRIV and KTXH in Houston.

Neither the Copyright Act nor the expired retransmission agreement between Licensee and TVMax give TVMax the right to continue to transmit the signals from KRIV and KTXH. Licensee first began discussing with you in September 2011 proposed terms of carriage of the Stations' signals. Since that time, Licensee has repeatedly attempted to contact you to further discuss the matter, but you have refused to substantively respond to Licensee's call, letters, and emails regarding this issue and, as of December 31, 2011, there is currently no retransmission agreement in place. On December 20, 2011, Joseph Di Scipio, Vice President, Legal and FCC Compliance for Licensee, sent you a letter regarding this matter, advising you that TVMax was required to cease retransmission of the Stations' signals as of December 31, 2011 at 11:59 p.m. Despite this demand, you have refused to do so, in blatant disregard of the law.

Given the foregoing, liability is not in question. The only issue to be decided by the court, should a lawsuit become necessary, is the amount of damages. As Mr. Di Scipio informed you in the December 2011 Letter, if TVMax continued to retransmit the signals of the Stations after December 31, 2011, Licensee would be entitled to pursue appropriate damages under Sections 504-505 of the Copyright Act, which allows a victim of willful copyright infringement to recover, at its election: (a) all actual damages or (b) statutory damages in the amount of \$150,000 per work, as well as costs and attorneys' fees. Since you were forewarned about the Act's application and still continued to retransmit the signals of the Stations, there is no doubt that a court would find that the violation by TVMax was willful. Furthermore, because

Richard Gomez
March 13, 2012
Page 2

TVMax continues to retransmit the signals of KRIV and KTXH after the expiration of the agreement, Licensee may also refer this matter to the FCC for violation of the Communications Act.

In accordance with the foregoing, Licensee demands that you immediately cease and desist retransmitting the signals of KRIV and KTXH. If TVMax does not cease retransmitting the signals of KRIV and KTXH by 5:00 p.m. on March 14, 2012, Licensee will have no choice but to move to protect its rights to the fullest extent under the law.

You have been previously notified that any post-December 31, 2011 retransmission of the signals of KRIV and KTXH are unauthorized and should not occur; therefore, your continued violation is willful and egregious. As such, Licensee will be able to recoup from you and your company exemplary and statutory damages for willful infringement plus reimbursement of its attorneys' fees.

This letter does not purport to set forth an exhaustive statement of all facts relevant to the matters complained of, nor shall any proposal or statement made in this letter be construed as a waiver of any right or remedy presently available to our clients, all such rights are being hereby expressly reserved.

We look forward to your swift confirmation that the signals have been pulled down.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Catherine L. Robb".

Catherine L. Robb
Sedgwick, LLP

CLR/dej

ATTACHMENT 5

TVMAX dba WAVEVISION

March 16, 2012

Catherine L. Robb
Sedgwick, LLP
919 Congress Avenue
Suite 1250
Austin, TX 78701-3656

RECEIVED
Mar 19 2012

Re: KRIV & KTXH

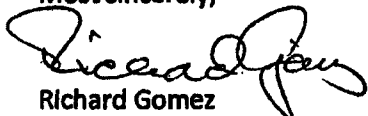
Dear Ms. Robb:

We have received your recent correspondence regarding payment for retransmission of your local broadcast signal.

Please allow this letter to serve as notification of our full compliance with the requirements of 47CFR 76.64(e). As such, the retransmission consent requirements are not applicable to Wavevision.

We look forward to our continued relationship with you.

Most sincerely,



Richard Gomez
Vice President and General Manager

ATTACHMENT 6



(512) 481-8400

Catherine.robbs@sedgwicklaw.com

March 22, 2012

Via Facsimile (713) 587-1280 and Certified Mail

Richard Gomez
Vice President Operations
TVMax Inc.
10300 Westoffice Drive, Suite 200
Houston, Texas 77042

Re: Notice to Cease and Desist Retransmission of KRIV and KTXH signals

Dear Mr. Gomez:

We are in receipt of your letter dated March 16, 2012 in which you claim that TVMax d/b/a Wavevision ("TVMax") is in "full compliance with the requirements of 47CFR 76.64(e)" and that the "retransmission consent requirements are not applicable to Wavevision." We strenuously disagree with your assertion that TVMax is in compliance with 47 C.F.R. § 76.64(e) and exempt from the retransmission consent requirements. As you are aware, in order to qualify for the exemption under 47 C.F.R. § 76.64(e), TV Max must:

1. Receive the stations' signals by master antenna television reception facilities or by direct over-the-air reception in conjunction with MVPD service; and
2. Make the reception of the stations' signals available without charge and at the subscriber's option; and either,
3. (a) The antenna facility used for the reception of the stations' signals must be owned by the subscriber or the building owner; or
(b) The antenna facility must be under the control and available for purchase by the subscriber or the building owner upon termination of service.

We believe that TV Max is receiving KRIV/KTXH signals off-air at a specific headend and distributing those signals to a number of multiple dwelling units via a fiber ring. Such a configuration would not meet the test in either prong 3(a) or 3(b) above. We also have no reason to think that TVMax has satisfied the first two prongs, which must also be met. Therefore, TVMax does not satisfy the requirements for exemption. If you believe that there is information not in our possession that would demonstrate that TVMax does satisfy all of the requirements for exemption, please explain to us in detail your reasons for so believing, so that we may evaluate them. If not, we expect that TVMax will immediately cease retransmission of the KRIV and KTXH signals.

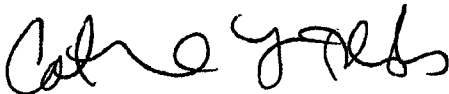
Richard Gomez
March 22, 2012
Page 2

If we do not hear from you within 2 business days (by close of business on Monday, March 26th) and receive either an adequate explanation for why TVMax is exempt or proof that you have ceased transmission of the signals, we will be filing a complaint with the FCC.

As you know, the FCC recently issued twin Notices of Apparent Liability ("NAL") to Bailey Cable TV, Inc. for carrying WVLA-TV and WGMB-TV in Baton Rouge without WVLA-TV's and WGMB-TV's respective consents. (Copies of the two NALs are attached). In those cases, the FCC stated that the base forfeiture for each violation of the cable broadcast carriage rules is \$7,500. In both situations, and in TVMax's, each day of carriage without consent is a violation. For Bailey, the forfeiture amount was, as to each station, \$7,500 x 34 days for a total base forfeiture of \$255,000 per NAL. The FCC reduced each forfeiture to \$15,000 per NAL (for a total of \$30,000 for the two NALs) due to financial information Bailey submitted to the FCC, but did state "We have previously rejected inability to pay claims in cases of repeated or otherwise egregious violations. Therefore, future violations of this kind may result in significantly higher forfeitures that may not be reduced due to Bailey's financial circumstances."

We look forward to your swift confirmation that you have ceased retransmission of the signals or a prompt, thorough, and adequate explanation for why TVMax is exempt – no later than close of business on Monday, March 26th.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Catherine L. Robb".

Catherine L. Robb
Sedgwick, LLP

CLR/dej

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Bailey Cable TV, Inc.) MB Docket No. 12-35
) CSR No. 8585-C
) NAL/Acct. No.: MB-201241410024
) FRN: 0011409034

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 16, 2012

Released: March 16, 2012

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability For Forfeiture ("NAL"), we find that Bailey Cable TV, Inc. ("Bailey") apparently willfully and repeatedly violated Section 325 of the Communications Act of 1934, as amended (the "Act"), and Section 76.64 of the Commission's rules, by retransmitting the signal of a broadcasting station without "the express authority" of the originating station.¹ Based upon our review of the facts, we find Bailey apparently liable for a monetary forfeiture in the amount of fifteen thousand dollars (\$15,000).

II. BACKGROUND

2. Knight Broadcasting of Baton Rouge License Corp. ("White Knight") is the licensee of full-power television station WVLA-TV, Baton Rouge, Louisiana. White Knight filed a complaint with the Commission, alleging that Bailey retransmitted without consent the signal of WVLA-TV on its cable system serving St. Francisville, Louisiana; Angola, Louisiana; and certain unincorporated areas within West Feliciana Parish, Louisiana (the "Communities").²

3. Bailey's cable system serving the Communities is a multichannel video programming distributor ("MVPD"), and WVLA-TV is a broadcasting station within the Baton Rouge Designated Market Area ("DMA") served by Bailey.³ For the 2012-2014 carriage cycle, for the Bailey cable system serving the Communities, White Knight elected retransmission consent for WVLA-TV.⁴ Although Bailey's retransmission consent agreement with White Knight expired on December 31, 2011, Bailey

¹ 47 U.S.C. § 325(b)(1)(A); 47 C.F.R. § 76.64(a).

² See Enforcement Complaint Concerning WVLA-TV, Baton Rouge, Louisiana (dated Jan. 25, 2012) ("WVLA-TV Complaint"). Concurrently with this NAL, we are issuing a Notice of Apparent Liability For Forfeiture pertaining to a similar complaint filed by Communications Corporation of America ("ComCorp"), the parent company of the licensee of full-power television station WGMB-TV, Baton Rouge, Louisiana, against Bailey. See Enforcement Complaint Concerning WGMB-TV, Baton Rouge, Louisiana (dated Jan. 23, 2012) ("WGMB-TV Complaint"). Bailey was formerly known as Audubon Cablevision. See WVLA-TV Complaint at 1.

³ *Id.* at 2.

⁴ *Id.* at 2-3 and Ex. A.

continued carrying WVLA-TV despite the absence of an extension or renewal agreement.⁵ White Knight informed Bailey, both before and after the expiration of the retransmission consent agreement, that Bailey was not permitted to retransmit WVLA-TV once the agreement expired.⁶ White Knight seeks an order directing Bailey to comply with the law and imposing appropriate sanctions for its knowing, deliberate, and continuing violations.⁷

4. In response, Bailey does not refute that it retransmitted WVLA-TV without express, written consent.⁸ Rather, Bailey argues that it faced a “dramatic increase” in requested retransmission consent fees, and states that it receives the signal by antenna rather than satellite or the Internet.⁹ Bailey claims that White Knight is “using [the Commission] as a tool to negotiate a dramatic increase in rates” and it requests that the Commission require the fair negotiation of a reasonable rate.¹⁰ On February 3, 2012, following a telephone conference with Commission staff and the parties, Bailey and White Knight executed an agreement extending the term of their retransmission consent agreement.¹¹

III. DISCUSSION

5. As described below, we conclude that Bailey is apparently liable for a forfeiture in the amount of fifteen thousand dollars (\$15,000) for its apparent willful and repeated retransmission of WVLA-TV’s signal without the express authority of the originating station. Under Section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹² Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the

⁵ *Id.* at 3. White Knight claims that it “made every effort to extend the Agreement with Bailey, but Bailey refused to engage in good faith negotiations and ignored repeated entreaties by White Knight to discuss the renewal of the Agreement on mutually acceptable terms.” *Id.*

⁶ *Id.* at 3-4. White Knight alleges that its designated negotiator contacted Bailey on December 30, 2011, “and advised it that at midnight on December 31, 2011, the Agreement would expire and Bailey would no longer have authority to retransmit the programming for WVLA-TV.” *Id.* On January 3, 2012, White Knight faxed and e-mailed Bailey a letter stating that its continuing carriage of WVLA-TV was in violation of federal law. *Id.* at 4 and Ex. C.

⁷ *Id.* at 1.

⁸ Bailey Cable TV, Inc. Answer to Enforcement Complaint Concerning WVLA-TV, Baton Rouge, Louisiana (dated Jan. 30, 2012) (“Bailey Answer”). Bailey informed the Commission that it did not intend to file a separate answer to the WGMB-TV Complaint, and that the same arguments would apply. During a telephone conference with Commission staff, ComCorp and White Knight on February 3, 2012, Bailey made the same arguments with regard to both stations. Accordingly, for purposes of the separate *NAL* involving WGMB-TV, we will treat the Bailey Answer as pertaining to the WGMB-TV Complaint as well as the WVLA-TV Complaint.

⁹ *Id.* at 1. Bailey also claims that it erroneously received a contract for the Hartford-New Haven area that covered all broadcast networks. *See id.* at 1 and Ex. A. Given that the contract clearly labeled two fictitious stations in the Hartford-New Haven DMA as examples, this argument fails. *See id.* at Ex. A.

¹⁰ *See id.* at 1.

¹¹ *See* Letter from Stuart Shorenstein, Counsel to Knight Broadcasting of Baton Rouge License Corp., to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau, at 1 (Feb. 28, 2012). Bailey erroneously indicated that the date of the telephone conference was February 2, 2012. *See* Letter from David A. Bailey, Bailey Cable TV, Inc., to Steven A. Broecker, Senior Deputy Chief, Policy Division, Media Bureau (Feb. 27, 2012).

¹² *See* 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(2).

law.¹³ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁴ and the Commission has so interpreted the term in the Section 503(b) context.¹⁵ The Commission may also assess a forfeiture for violations that are merely repeated and not willful.¹⁶ "Repeated" means that the act was committed or omitted more than once or lasts more than one day.¹⁷ In order to impose a forfeiture, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed or why it should be reduced and must include a detailed factual statement and pertinent documents and affidavits as support.¹⁸ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.¹⁹

6. Section 325 of the Act requires cable systems and other MVPDs to obtain "the express authority of the originating station" to retransmit a broadcasting station's signal.²⁰ This requirement is codified in Section 76.64 of the Commission's rules, which further requires retransmission consent agreements to be in writing and to "specify the extent of the consent being granted."²¹ The Commission previously stated that if an MVPD retransmits a television signal without consent, Commission intervention would be consistent with precedent and "properly documented retransmission of a television signal without consent would be grounds for imposition of a forfeiture."²²

7. We find that Bailey apparently violated Section 325 of the Act and Section 76.64 of the Commission's rules by retransmitting WVLA-TV's signal without the required consent. Bailey does not dispute White Knight's allegations that it retransmitted WVLA-TV's signal despite the expiration of the retransmission consent agreement and the failure to enter into an extension or renewal agreement.²³ Bailey objects to the increase in the retransmission consent fees requested by White Knight,²⁴ but such an increase does not justify an MVPD's retransmission of a broadcasting station's signal without the originating station's express authority. We also find irrelevant to this matter Bailey's statement that it

¹³ 47 U.S.C. § 312(f)(1).

¹⁴ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁵ See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁶ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) ("*Callais Cablevision, Inc.*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

¹⁷ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

¹⁸ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁹ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

²⁰ 47 U.S.C. § 325(b)(1)(A). Although there are certain exceptions to this requirement, including for local commercial stations that have elected to assert their mandatory carriage rights, no exceptions apply to the present situation. See WVLA-TV Complaint at 2 n. 1; 47 U.S.C. §§ 325(b)(1)(B), 534(b).

²¹ 47 C.F.R. § 76.64(a), (j).

²² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 3005, ¶ 175 (1993).

²³ Bailey Answer.

²⁴ See *id.* at 1.